LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 18 1971
SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-5462

GEORGE WHITMORE, JR.,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BELDOCK LEVINE & HOFFMAN
565 Fifth Avenue
New York, New York 10017

ARTHUR H. MILLER
9602 Church Avenue
Brooklyn, New York 11212

On the Petition

MYRON BELDOCK
LAURA SAGER
BELDOCK LEVINE & HOFFMAN
565 Fifth Avenue
New York, New York 10017

INDEX

	PAGE
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Relied On	3
Statement of the Case	3
How the Questions Were Raised Below	4
Statement of Facts	7

REASONS FOR GRANTING THE WRIT

I. Petitioner was denied due process of law by reason of the in-court identification by Mrs. Borrero, who had viewed him at several showups and throughout extended highly suggestive circumstances of police custody. This Court should grant certiorari to resolve the substantial federal question, about which the Circuits are in conflict, of whether under *Stovall* v. *Denno* the in-court identification was inadmissible in the absence of any necessity for the showups; and to correct the lower court's misapplication of *Stovall* v. *Denno*, by expressly refusing to consider the effect of the prejudicial events at the precinct as part of the totality of the circumstances 14

PAGE

II. This Court should grant certiorari because the suppression of evidence by the prosecutor in this case was a flagrant denial of due process of law, and because the lower court misconstrued the applicable standard of materiality under *Brady* v. *Maryland* 21

III. This Court should grant certiorari to reverse a conviction based solely on shockingly unreliable identification testimony 25

CONCLUSION 27

APPENDIX:

Opinion of the Court of Appeals of New York, Rendered: April 23, 1971 ..... 1a

Opinion of the Court of Appeals of New York, Rendered: February 17, 1971 ..... 11a

Opinion of the Supreme Court, Appellate Division. Second Department, Kings County, New York, Rendered: July 27, 1970 ..... 12a

Opinion of Judge Helfand of the Supreme Court, Kings County, Dated December 1, 1969 ..... 14a

Decision of Judge Helfand of the Supreme Court, Kings County, New York, at the Conclusion of the Identification Hearing, and Read Into the Record on April 8, 1969 at Pages 656 Through 658 of the Transcript 17a

PAGE

Opinion of the Supreme Court, Appellate Division, Second Department, Rendered: November 18, 1965 ..... 19a

Opinion of the Appellate Division 20a

Order of the Court of Appeals of New York Amending the Remittitur, Rendered: July 7, 1971 ..... 21a

Exhibit I to Defendant's Reply Affirmation in Support of His Motion for a New Trial Based on the Suppression of Evidence at Pages 626 Through 628 of That Motion Quoting From the Transcript of the First Borrero Trial 23a

Excerpt From Petitioner's Reply Affirmation in Support of His Motion for a New Trial or Dismissal of the Indictment Based on the Discovery of Suppressed Evidence (pp. 15-17) 25a

Excerpt From Petitioner's Reply Affirmation in Support of This Motion for a New Trial or Dismissal of the Indictment Based on the Discovery of Suppressed Evidence (pp. 26-27) 27a

Excerpts From Pages 21 Through 23 and Page 32 of Defendant's Reply Affirmation in Support of His Motion for a New Trial Based on Suppression of Evidence With Reference to Whitmore's Trial in 1965 for the Edmonds Crime 29a

Table of Authorities

PAGE

Cases:

Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962) 24

Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) 22
Brady v. Maryland, 373 U.S. 83 (1963) 21, 24

Foster v. Calif., 394 U.S. 440 (1969) 14

Giles v. Maryland, 386 U.S. 66 (1967) 21

Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969), aff'd 424 F.2d 631 (9th Cir.), cert. den. 400 U.S. 865 (1970) 22

Miranda v. Arizona, 384 U.S. 436 (1966) 4, 11

People v. Rivera, 22 N.Y.2d 453, 293 N.Y.S.2d 271, 239 N.E.2d 873 (1968) 17
People v. Robles, 27 N.Y.2d 155, 314 N.Y.S.2d 793, 268 N.E.2d 304 (1970) 11
People v. Whitmore, 22 A.D.2d 939, 278 N.Y.S.2d 706 (1967) 22
People v. Whitmore, 45 Misc.2d 506, 257 N.Y.S.2d 787 (S. Ct. Kings Cty. 1965) 21
Peyton v. Palmer, 359 F.2d 199 (4th Cir. 1966) 15

Simmons v. U. S., 390 U.S. 377 (1968) 14
Stovall v. Denno, 388 U.S. 293 (1967) 2, 14, 16, 20, 25

PAGE

U. S. v. Gilmore, 398 F.2d 679 (7th Cir. 1968) 16
U. S. v. Keough, 391 F.2d 138 (2d Cir. 1968) 24
U. S. v. Polisi, 416 F.2d 573 (2d Cir. 1969) 24
U. S. ex rel. Rutherford v. Deegan, 406 F.2d 217 (2d Cir.), cert. den. 395 U.S. 938 (1969) 16
U. S. ex rel. Thompson v. Dyle, 221 F.2d 763 (3d Cir.), cert. den. 350 U.S. 875 (1955) 22

Wright v. U. S., 404 F.2d 1256 (5th Cir. 1968) 16

Constitutional Provisions:

United States Constitution

Fifth Amendment 3, 7
Fourteenth Amendment 3, 7

Statute:

28 U.S.C. §1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

GEORGE WHITMORE, JR.,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of New York entered in the above entitled case on April 23, 1971.

Citation to Opinion Below

The New York Court of Appeals affirmed the decision below without opinion in a four to three decision reported at 28 N.Y.2d 826, 322 N.Y.S.2d 65, 270 N.E.2d 893 (1971) and printed in the Appendix (*infra* pp. 1a-13a). Before rendering its decision, the Court had ordered reargument, 28 N.Y.2d 587, 319 N.Y.S.2d 620, 268 N.E.2d 331 (1971) (App. *infra* p. 11a). The opinion of the Appellate Division affirming the conviction appears at 35 A.D.2d 607, 313 N.Y.S.2d 433 (1970). See Appendix *infra* pp. 12a-13a. The Appellate Division's opinion, ordering an identification hearing is found at 30 A.D.2d 877, 293 N.Y.S.2d 712 (1968), Appendix *infra* p. 20a.

Jurisdiction

The judgment of the Court of Appeals of New York was entered on April 23, 1971. Mr. Justice Harlan extended the time in which to file this petition for certiorari to and including September 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

Questions Presented

1. Whether, under the standards of *Stovall* v. *Denno*, the admission into evidence of an in-court identification by the victim deprived the Petitioner of due process of law, and specifically:

a) Whether, under *Stovall*, the in-court identification was per se inadmissible in the absence of any necessity for the police to conduct three highly suggestive stationhouse showups; and

b) Whether, at the post-trial identification hearing, the failure of the court to consider "the totality of the circumstances" as required by *Stovall* resulted in a denial of due process to Petitioner in that the court therefore failed to recognize that the victim's in-court identification was hopelessly tainted by the events surrounding her stationhouse identification, which included three highly suggestive showups, numerous additional viewings of Petitioner in police custody tending to suggest that the police believed they had found the guilty man, and extensive exposure to the fact that the Petitioner had confessed to other notorious crimes.

2. Whether the prosecution's suppression of favorable eyewitness testimony and the existence of an additional showup of Petitioner constituted a denial of due process of law; and whether the court below erroneously determined this claim with reference to its effect on the jury's verdict rather than on the defendant's preparation for trial.

3. Whether Petitioner's conviction rests on such inherently unreliable identification testimony that it constitutes a denial of due process of law.

Constitutional Provision Relied On

Petitioner relies on the Fifth and Fourteenth Amendments to the United States Constitution.

Statement of the Case

George Whitmore was tried and convicted for the third time (Supreme Court Kings County Indictment No. 1176/1964) for attempted rape first degree, and assault second degree; and was sentenced on June 8, 1967 to 5 to 10 years and 2½ to 5 years concurrently.

This petition involves a third trial, a post-trial identification hearing and a post-hearing motion to dismiss the indictment or for a new trial.

Whitmore was allegedly identified by Mrs. Elba Borrero as her assailant at the 73rd Precinct on April 24, 1964—the same infamous day during which it was originally claimed that he voluntarily and truthfully confessed not only to the Borrero attempted rape and assault, but to the earlier "rape" murders of Minnie Edmonds in Kings County and

of the Wylie and Hoffert girls in New York County. The history of these other charges and of the two earlier Borrero trials is recited in the Court of Appeals dissent. 28 N.Y.2d 826, 829-830, 322 N.Y.S.2d 65, 66-67, 270 N.E.2d 894-895 (1971) (App., *infra*, pp. 3a-5a). The "confessions" to the Edmonds and Wylie/Hoffert crimes have long since been discredited and the charges dismissed. The shockingly deceitful and illegal police actions which brought about those false confessions and charges have long since become judicial and public knowledge. See dissenting opinion *infra*. The Borrero charges persist as the cancerous root of this dishonorable affair.

In accordance with a pre-trial stipulation and order, and contrary to the procedure at the two proceeding trials, no alleged confessions were offered or mentioned because the Court and counsel all operated under the misapprehension that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), applied to re-trials after its effective date.

The People's case at the third trial was based primarily on the in-court identification of Mrs. Borrero, the complaining witness, and the testimony of Patrolman Isola, who came upon the scene of the crime.

How the Questions Were Raised Below

Defense counsel moved prior to trial for a hearing to determine whether Mrs. Borrero's identification was tainted by the circumstances at the precinct. This was denied by the court (Minutes of Motion, May 8, 1967, pp. 7-10). At the trial, before Mrs. Borrero identified Whitmore in-court, defense counsel requested *voir dire* on the issue of taint.

The court denied this motion (T. 74-75).* At the conclusion of the trial, the defense unsuccessfully moved to dismiss, relying in part on the claim that the admission of identification testimony was a denial of due process (T. 132-133). In the course of these motions, the identification testimony was challenged as having been the fruit of the defendant's inadmissible statements; and as having been tainted by and derived from unconstitutional procedures at the police station at the time complainant initially identified the defendant, including the improper show-up, the subsequent alleged voice identification and the suggestive nature of the language involved in the latter procedure. The Judge held that there was no authority for a pre-trial hearing or *voir dire* and ruled that the identification could only be challenged by cross-examination or by offering evidence before the jury concerning the events at the station house. In this regard, defense counsel took the position that Whitmore was first entitled to a judicial hearing; and that to have raised the issue for the first time before the jury would have prejudiced the defendant. Because of this erroneous ruling, neither the Judge nor jury was ever apprised of the extraordinarily suggestive circumstances at the station house that day, which included a series of shows and Mrs. Borrero's observing Whitmore on a number of occasions from about 7:00 A.M. to 11:30 P.M., during which time he was questioned and ultimately confessed to this and the two additional crimes.

Defense motions to dismiss at the end of the prosecution's case, and for a directed verdict of acquittal at the

---

* References to pages of trial transcript are prefaced by "T" and to pages of post-trial hearing by "H."

conclusion of the entire case on the grounds of insufficient evidence were denied (T. 132-133; 137-138).

On appeal, the Appellate Division remitted the case for an evidentiary hearing as to whether the complainant's in-court identification was tainted by the improper show-up. 30 A.D.2d 877, 293 N.Y.S.2d 712 (1968); and denied defendant's subsequent motion to disqualify the trial judge (App. *infra* p. 19a). The ensuing hearing involved an extensive inquiry into the facts of the case. In the course of the hearing significant circumstances, discrepancies and conflicts emerged which completely undermined the alleged identification and the entire case against Whitmore. See dissent of Breitel, J. 28 N.Y.2d 826, 831-834, 322 N.Y.S.2d 65, 68-71, 270 N.E.2d 895-897 (1971) (App., *infra,* pp. 6a-10a). Two new avenues of evidence were revealed: Mrs. Borrero disclosed for the first time in all the proceedings that she had viewed Whitmore at an additional show-up in which he was made to wear a coat and hat (H. 243-244); and the defense learned for the first time of an additional eyewitness to the crime, Mrs. Borrero's sister-in-law, who had given the police a description of the assailant that had been previously attributed to Mrs. Borrero by police misrepresentation (H. 507-509, 520-522).

During the hearing, the trial judge expressly took the position that he did not have to review the circumstances of the station house identifications since the Appellate Division had already disapproved of the showup (H. 534). The court ruled that the in-court identification was free from taint, relying solely on the circumstances at the time of the crime (App., *infra,* pp. 17a-18a).

Subsequently, a motion for a new trial or for dismissal of the indictment, based on the suppressed or newly revealed

evidence and for an evidentiary hearing on those issues was denied by the same judge (App., *infra,* pp. 14a-16a). The appeals from the trial, the post-trial hearing, and the post-hearing motion were subsequently consolidated and denied by the Appellate Division (App., *infra,* pp. 12a-13a). The Court of Appeals affirmed without opinion. A vigorous dissent was filed by Judge Breitel in which Chief Judge Fuld and Judge Jasen concurred (App. *infra* pp. 1a-10a). On motion to amend the remittitur, the Court of Appeals declared that it had necessarily passed on defendant's 5th and 14th amendment claims based on the denial of his motion for a pre-trial identification hearing and held there was no denial of his constitutional rights (App. *infra* pp. 21a-22a).

Statement of Facts

The statement of facts below is culled from the evidence at the trial and the post-trial hearing. The trial basically consisted of the testimony of the victim, Mrs. Borrero, and Patrolman Isola about the circumstances of the crime and her in-court identification of Whitmore. This evidence was relatively simple compared with the detailed inquiry at the identification hearing. Yet because of the court's exclusionary rulings, defense counsel was unable to probe thoroughly the events of April 23 and 24, 1964 and to expose all the evidence of police deceit and trickery, including the means by which Whitmore's three confessions were obtained, whose legacy is this conviction.

On April 23, 1964, Mrs. Elba Borrero was returning home from work about 1:00 A.M. when she was assailed on the street by a man who grabbed her around the neck from behind, stifled her one scream with a deadly threat,

took her purse and forced her to walk a short distance up and down the block and into an alleyway (T. 57-58, 64-67). Walking his beat, Patrolman Isola heard the scream, looked up and saw the couple walking, swiftly followed them into the alleyway, shone his light on them, saw the side of the man's face, heard him say "Oh, my God", chased him, fired shots and lost him nearby on Amboy Street (T. 87-97, 106). About 15 minutes later, the patrolman interviewed Mrs. Borrero and obtained and promptly recorded her full description of the assailant and crime (T. 97-98, 111, 114; see 105, 117).

Four contemporaneous official records of Mrs. Borrero's descriptions were made by three officers as a result of the initial investigation: (1) Patrolman Isola's notebook containing her description given almost immediately after the crime (T. 117; H. 284, 313); (2) the General Alarm which went out at 2:00 A.M. based on information Detective Grace received from his conversation with Mrs. Borrero at her apartment (T. 117; H. 285, 617-18, 621, 625-629, 631); (3) the police blotter report from information received at 1:45 A.M. and made by Sergeant Cates who responded to the scene (H. 285-287); (4) the UF61 official police report which was prepared after Isola and Grace had interviewed Mrs. Borrero and reviewed by Grace that morning (T. 109; H. 287-288, 621, 625). The recorded descriptions of the crime and of the man were essentially the same. The crime was an attempted larceny/pocketbook snatch—without a word regarding attempted rape and sexual assault. The man was a Negro male, 20-25 years old, 5'9", 165 lbs., wearing a ¾ length tan coat, no hat, no further description.

When Isola first spoke to George Whitmore at about 7:00 the same morning in a launderette nearby, Whit-

more said he had seen a man being chased by police run into a building on Amboy Street the previous night and led Isola to the building (T. 98, 101-102). During that half hour spent with Whitmore, Isola had no suspicion that Whitmore was the man he had chased (T. 114).

Whitmore, concededly did not fit the official descriptions of Mrs. Borrero's assailant. When Isola met him, Whitmore was 19 years old, 5'6", 130 lbs., decidedly light skinned, noticeably pock marked; and was wearing a ¾ tan raincoat and a hat (T. 98-100, 111, 113-114; H. 376-377, 378-381, 576-579). The man Isola had seen and chased was not wearing a hat (T. 99-100; H. 314, 321-323).

Isola advised the precinct of his encounter with Whitmore, whom he regarded as a potential witness (H. 447-48). In the course of the day, control of the case was moved from Detective Grace to Detective Aidala, who was then working on the investigation of the Minnie Edmond's case, a necrophiliac rape-murder that had recently occurred within one block of the Borrero crime. Aidala noticed a similar modus operandi—both women had been dragged from the street into an alley-way (H. 528). Aidala and Detective DePrima interviewed Mrs. Borrero at her house that day (H. 497, 500). The notebook description recorded by Detective DePrima from Mrs. Borrero was of a male Negro, 22-27 years old, 5'7" or 5'8", wearing a tan or beige coat (H. 607). Detective Aidala had a notebook description of a "male, Negro, tan or beige coat, long coat, no hat, 5'7" or 5'8", 26 or 27 years", which he attributed to Mrs. Borrero when questioned at the 1965 Edmonds trial; he only revealed for the first time at the post-trial hearing in 1969 that it was in fact made by Mrs. Borrero's sister-in-law, a hitherto undisclosed eyewitness who had viewed the assault from a window (H. 508).

At the trial and post-trial hearing, as at all earlier proceedings, Mrs. Borrero, Patrolman Isola and Detective Aidala repudiated all the officially recorded descriptions. Despite those records, the complainant has at all times testified that what the several officers wrote down was an error and that the description she gave them fit Whitmore almost exactly—including height, approximate weight, light skin, pock marks, and the coat and hat (T. 84-85; H. 128-130, 208-209, 213, 216); and that this was the true appearance of her assailant.

In the face of their own records the several police witnesses have always testified, with full knowledge of the importance of such descriptive elements as light skin, pock marks, hat, etc., that Mrs. Borrero was correct and that they either did not write down what she told them or wrote down something else (T. 104-105, 109-114, 117-119, 126-127; H. 305, 314-316, 319-322; H. 510-511, 525-527).

Early in the morning of April 24, the day following the crime, Aidala found Whitmore once again at the same launderette and without introductory questioning, the Detective and Patrolman Isola took him to the stationhouse as a suspect (H. 391, 394, 1530).

No attempt was made to arrange a lineup (H. 414). Instead, Whitmore was exhibited to Mrs. Borrero in three peep-hole show-ups. When Mrs. Borrero first viewed Whitmore through the peep-hole, she became very upset and frightened (H. 416, 514). She did not immediately identify him. Instead, when Aidala came into the room, she asked to hear Whitmore speak (H. 234, 422). Mrs. Borrero did not specify the words she wished to hear (H. 542-43), but Aidala had Whitmore say, among other things, "I'll kill you and then I'll rape you" (H. 548-49), although

Aidala had not been told that the assailant said these words (H. 554).

At all the previous trials and hearings, Mrs. Borrero had testified that there were only two show-ups, the second including a voice identification. However, at the post-trial evidentiary hearing, she disclosed for the first time an additional show-up in which Whitmore was made to wear a coat and hat (H. 244).

Mrs. Borrero finally identified Whitmore by nodding her head (H. 543), and was then brought to a face to face confrontation with him, in which she accused him of being the assailant. Whitmore denied the accusation (H. 426, 427).

Following the identification, Whitmore was arrested (H. 419) and throughout the day was interrogated with regard to the Borrero and Edmonds crimes, and later with regard to the highly publicized murder-rape of the Wylie-Hoffert girls in Manhattan. By the end of the day he had confessed to all three crimes. At the post-trial hearing, the court refused to allow defense counsel to ask Aidala whether he tricked Whitmore into confessing to the Edmonds and Wylie-Hoffert cases (H. 575). However, both confessions had been discredited and both cases were dismissed on District Attorneys' motions. Another man later confessed to and was convicted of the Wylie-Hoffert crimes. *People* v. *Roblas*, 27 N.Y.2d 155, 314 N.Y.S.2d 793, 268 N.E.2d 304 (1970). The confessions obtained from Whitmore were noted by this Court in a footnote to *Miranda* v. *Arizona*, 384 U.S. 436, 455 (1966), as the kind of confessions against which the *Miranda* rules were designed to guard.

Throughout the day, at the request of Detective Aidala, Mrs. Borrero remained in the precinct waiting to have her statement taken by an Assistant District Attorney (H. 564). Despite the fact that an Assistant District Attorney did come by at 3:00 (H. 565-566), Mrs. Borrero's statement was not taken until 11:30 p.m., and she remained in the precinct the entire time, leaving only for lunch and for dinner (H. 79).

Mrs. Borrero sat for this entire time in the squad room and the interview room, both close by the Squad Commander's room, in which Whitmore was being questioned (H. 80-81). For much of the time she sat on a chair right outside the Squad Commander's office, from which she could see into the room when the door was opened, as it frequently was (H. 250, 253, 255, 558-59).

Mrs. Borrero saw Whitmore being taken out by the police in the morning to go to Amboy St. (H. 250) and again in the afternoon when he was taken to re-enact the Edmonds crime (H. 258, 440, 561). In addition, Whitmore was taken through the squad room at least once to go to the men's room (H. 559-60), and into the squad room to be fingerprinted at 3:30 (H. 477). For two hours in the evening, between approximately 9:00 and 11:00 p.m., Mrs. Borrero saw Whitmore confined in a cage in the squad room (H. 54, 580).

The squad room was a place of great excitement as the day wore on. Many people came and went, including high police officials (H. 463, 567-68). The door to the room in which Whitmore was being questioned was frequently opened (H. 558) and there were conversations in the squad room between police officials regarding the Edmonds and

Wylie-Hoffert cases as well as the Borrero case (H. 567). Mrs. Borrero sat in the squad room through all this activity. No officer had been assigned to remain with her, and no instructions had been given that police should not talk in her presence (H. 570).

Mrs. Borrero testified at the hearing that despite these facts she did not learn anything about the Edmonds or Wylie-Hoffert cases during the course of the day (H. 91-92), or that Whitmore had confessed to her own case (H. 78-79). The Court, however, expressed the opinion that it was inconceivable, under the circumstances, that she did not know of the other crimes (H. 486).

At 11:30 p.m., the Assistant District Attorney finally took Mrs. Borrero's statement, and in the course of this interview Whitmore was again brought briefly into the room with her (H. 51, 261).

On April 26, 1964, the day after Whitmore was arraigned for the sex crimes in the Borrero, Edmonds and Wylie-Hoffert cases, Detective Aidala personally changed the initial official police UF 61 report from attempted larceny to "robbery and attempted rape" (H. 517-519).

REASONS FOR GRANTING THE WRIT

I.

Petitioner was denied due process of law by reason of the in-court identification by Mrs. Borrero, who had viewed him at several showups and throughout extended highly suggestive circumstances of police custody. This Court should grant certiorari to resolve the substantial federal question, about which the Circuits are in conflict, of whether under *Stovall* v. *Denno* the in-court identification was inadmissible in the absence of any necessity for the showups; and to correct the lower court's misapplication of *Stovall* v. *Denno*, by expressly refusing to consider the effect of the prejudicial events at the precinct as part of the totality of the circumstances.

Showing a suspect singly for identification is inherently suggestive and can amount to a denial of due process of law when it is unnecessarily conducive to irreparable mistaken identification. *Stovall* v. *Denno*, 388 U.S. 293 (1967). Once a mistaken identification is made, the witness is apt to retain the mistaken image, thereby reducing the trustworthiness of a subsequent courtroom identification. *Simmons* v. *U. S.*, 390 U.S. 377, 383-84 (1968). Moreover, there is a denial of due process when the police repeatedly exhibit one particular person to the victim-witness, thereby suggesting that the police believe this is the man. *Foster* v. *Calif.*, 394 U.S. 440 (1969).

The police practices on April 24, 1964 strongly tended to suggest to Mrs. Borrero that Whitmore was the man. She was told that the police had a man at the station house they wanted her to look at and identify (H. 219, 220-222).

Petitioner was first exhibited to her in a peephole showup, at which she became extremely upset and frightened. Although she testified that she verbally identified him then and there (H. 229-230, 244-245) the police testimony indicated that at first she was too upset to say anything and, when she had calmed down, she asked to hear him speak and again viewed him through the peephole* (H. 413-417, 534-543). According to the testimony, without prior advice or prompting from Mrs. Borrero, Detective Aidala, then had Whitmore say (H. 233-234; 583-584; 548-549):

> "I am going to rape you; I am going to kill you first and then rape you; Let me touch your pussy."

In addition to these two showups, Mrs. Borrero also saw him an additional time when he was made to wear his coat and hat (H. 243-244). It is not clear whether this took place before or after he was made to speak (H. 246-247). However, it is clear that Mrs. Borrero was unable to positively identify him merely by the initial showup, and that at least the three showups were required.

Following the showups, which began shortly after 7:00 a.m., there was a face-to-face confrontation; and then Mrs. Borrero remained in the stationhouse at the request of Detective Aidala, leaving only for lunch and supper (H. 79). She sat just outside the room in which he was being questioned and the door to that room was open some of the time (H. 250, 258-259). She saw Whitmore being led to and from that room several times during the day (H. 250, 258); she was in the room where he was brought to

* In *Peyton* v. *Palmer*, 359 F.2d 199 (4th Cir. 1966), the Court suggested that it is a denial of due process for the police to have only one person speak for identification.

be fingerprinted following his confession (H. 477); and she saw him for a period of two hours while he was confined in a cage in the evening (H. 54). After all these viewings of him, as well as being in the room in which excited police officers were discussing the cases (H. 567)—as a result of which she undoubtedly learned that he was implicated in, and probably that he had confessed to the other crimes—Mrs. Borrero finally gave her statement to the Assistant District Attorney, at 11:30 p.m., during which time Whitmore was again brought into her presence (H. 51).

The initial three showups suffered from the inherent suggestiveness so aptly described in *Stovall*, and from the likelihood that she would henceforth retain the image of the man she had seen in the showups. Mrs. Borrero's subsequent and unnecessary viewings of Petitioner in police custody had the effect of reinforcing her belief that the police thought they had found the man guilty of assaulting her and of two other serious crimes.

In *Stovall*, where the facts suggested that it would have been difficult, if not impossible, for the police to arrange a lineup, it was held there was no denial of due process. At least one circuit has held that no in-court identification may be made absent evidence that a showup was necessary. *U. S.* v. *Gilmore*, 398 F.2d 679, 682 (7th Cir. 1968). See also *Wright* v. *U. S.*, 404 F.2d 1256, 1262 (5th Cir. 1968) (Bazelon, Chief Judge, dissenting). Other circuits do not inquire into the necessity for the showup. See, e.g. *U. S. ex rel. Rutherford* v. *Deegan*, 406 F.2d 217 (2d Cir. 1969), cert. den. 395 U.S. 938 (1969).

In the instant case, there was no evidence of special circumstances necessitating a showup and Patrolman Isola

testified at the first Whitmore trial that no attempt was made to arrange a lineup (H. 414). Nor was there evidence of any valid reason why Mrs. Borrero was made to remain throughout most of the day and night in the precinct, situated where she was exposed to such prejudicial sights and conversations. Detective Aidala said that he had her remain there in order to have her statement taken, but even when an Assistant District Attorney arrived at 3:00 p.m., her statement was not taken.

However, the Court below considered the question of the justification for the showup to be irrelevant because the Appellate Division had already ruled the showup was "no good" (H. 534). The Court prevented defense counsel from asking Detective Aidala, who was in charge of the investigation, whether any attempt was made to arrange a lineup (H. 532-533), and asking why her statement was not taken by the Assistant District Attorney at 3:00 P.M. (H. 565-66).

The Appellate Division sent the matter back for a hearing on taint, assuming that the showup was improper. The New York Courts do not as a matter of course require an evidentiary hearing on taint whenever there has been a showup, see, e.g., *People* v. *Rivera*, 22 N.Y.2d 453, 293 N.Y.S.2d 271, 239 N.E.2d 873 (1968), but do so when the facts suggest a likelihood of mistaken identification.

The issue before the lower Court, therefore, was whether in light of the totality of the circumstances there was a substantial likelihood of irreparable mistaken identification. The record of the hearing overwhelmingly indicates that there was such a likelihood. The inherent suggestiveness of the showups, made more suggestive by the voice identification and the words Whitmore was made to say, combined

with the substantial difference between Whitmore and the officially recorded descriptions given by Mrs. Borrero and by her sister-in-law, give rise to a substantial likelihood that her identification of him was mistaken.

The record also strongly suggests that the likelihood of mistaken identification was in fact irreparable, because of the police culpability in allowing her to see Whitmore in such prejudicial circumstances and to hear his case discussed throughout the day, until she gave the Assistant District Attorney her statement. Any doubts she might have had about the accuracy of her identification, and any possibility that she could confront Whitmore at a later time with an open mind, free from the influence of the showups, were totally destroyed by the events of that day, deliberately caused, or at the very least sanctioned by the police.

Yet the lower Court consistently refused to admit evidence relevant to the questions of whether her identification at the showup was mistaken, and whether the taint of the showup was irreparable.

Thus, for example, on the question of whether her identification was mistaken: the Court refused to admit a photograph of Whitmore taken on the day he confessed, showing the difference between him and the man in the official police descriptions (H. 577-78); the Court refused to allow defense counsel to examine Detective Aidala about the description obtained from the sister-in-law and whether Mrs. Borrero had spoken to him regarding what her sister-in-law saw, even though that description was from an eyewitness who corroborated the official police descriptions and impeached Mrs. Borrero's testimony that the police did not write down what she told them (H. 522-523); the Court

restricted inquiry into the circumstances of the showup, with regard to when Whitmore was made to wear his coat and hat (H. 534) and who supplied the words that he was made to speak (H. 461), even though such questions had a bearing on the suggestiveness of the showup.

On the question of the effect on Mrs. Borrero of the circumstances at the stationhouse, the Court refused to allow testimony as to which desk in the squad room Mrs. Borrero sat at—information relevant to her location and therefore her ability to see Whitmore and hear police conversations (H. 444-445); or how many police came into the squad room (H. 464) or whether high police officials came to the precinct (H. 609)—information relevant to the impression being made on her.

The Court's attitude was expressed by his admonition "Let's not pick the day apart," (H. 436), and by his statement:

> "... I just ruled that I do not intend to review the whole matter of the identification in the Police Department because the Appellate Division said in simple language, it was no good" (H. 534).

The record shows and Judge Helfand's opinion explicitly states that the lower Court was only concerned about whether Mrs. Borrero had an independent basis for her in-court identification through her observation at the time of the crime (see App. *infra* pp. 17a-18a). Although she saw her assailant only briefly, on a dark rainy night under circumstances of great fear, the Court found that she had such an independent basis.

Moreover, the Court explicitly characterized the "discrepancies and inconsistencies" in the testimony as irrele-

vant to what the Court described as the "principal narrow issue which the Appellate Division ordered this Court to hear and determine" (App. *infra* p. 18a). In the lower Court's view, that narrow issue was solely whether there was an independent basis for identification. The Court's failure to make any findings of fact concerning the circumstances at the precinct, cemented its refusal to consider the totality of circumstances and to properly evaluate the evidence showing that, although she may have been able to observe the assailant at the time of the crime, the police had created such an overwhelming likelihood of irreparable mistaken identification that her subsequent in-court identification was too untrustworthy to be admitted into evidence. Such a misapplication of the principles of *Stovall* requires this Court to grant certiorari and to clearly delineate the scope of a judicial inquiry in response to such a claimed denial of due process.

II.

This Court should grant certiorari because the suppression of evidence by the prosecutor in this case was a flagrant denial of due process of law, and because the lower court misconstrued the applicable standard of materiality under *Brady* v. *Maryland*.

At the post-trial evidentiary hearing in 1969 the defense learned for the first time of two areas of suppressed evidence which would have been extremely helpful: that Mrs. Borrero had viewed Whitmore clothed with coat and hat at an additional showup; and that her sister-in-law was an eyewitness whose description corroborated the other police records and differed substantially from Whitmore and from Mrs. Borrero's testimony as to her assailant's appearance.

Suppression of evidence favorable to the defense violates due process, *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1963). Indeed, Petitioner's first conviction was reversed partly because the prosecution had suppressed the existence of an FBI report that would have been helpful to the defense. *People* v. *Whitmore*, 45 Misc.2d 506, 257 N.Y.S.2d 787 (S. Ct. Kings Cty. 1965). Yet, despite strong evidence of continued prosecutorial suppression of equally if not more significant facts, the lower court denied the motion for a new trial, holding that defense counsel had overlooked the evidence that was available to them and in any event that "even if this 'new' evidence had been adduced at trial the result would have been the same" (see App. p. 16a).

Failure to request evidence whose existence was unknown does not obviate the prosecutor's duty to reveal

such evidence in order to insure a fair trial. See, e.g., *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964) and *U. S. ex rel. Thompson* v. *Dyle*, 221 F.2d 763 (3d Cir. 1955), cert. den. 350 U.S. 875 (1955); *Imbler* v. *Craven*, 298 F. Supp. 795, 811 (C.D. Calif. 1969), aff'd 424 F.2d 631 (9th Cir. 1970), cert. den. 400 U.S. 865 (1970).

Moreover petitioner did request information about the suppressed showup in that defense counsel had questioned Mrs. Borrero and various police officers at previous trials and hearings about the identification procedures at the station house and had never been told of the additional showup.

With respect to information about the sister-in-law, detailed analysis in the post-hearing motion papers of the records of the prior proceedings showed that petitioner's attempts to pursue lines of inquiry that might have revealed this information, were consistently opposed by various Assistant District Attorneys and were precluded by the lies of Detective Aidala. For example, at the first Borrero trial, there was no mention of Aidala's notebook. When Aidala testified that his only sources of information prior to bringing Whitmore to the precinct were Patrolman Isola and Detective Grace, but then added that he had personally gathered some information on the case, the Assistant District Attorney successfully persuaded the Court that such information only concerned the Edmonds homicide and prevented further inquiry by the defense (see App. pp. 31a-32a).

At the second Borrero trial, cross examination of Aidala was cut off at the start because of objections of the prosecutor which the Court erroneously sustained. *People* v. *Whitmore*, 22 A.D.2d 939, 278 N.Y.S.2d 706 (1967).

At the pre-trial hearing on the Edmonds case, when Aidala's notebook was first produced, the prosecution represented to the Court that only four pages in that notebook were relevant to the defense and at the prosecution's insistence the defense was allowed to see only those four pages. All other pages in the notebook were sealed by rubber bands (see App. pp. 25a-26a). At the Edmonds trial, unknown to defense counsel who was allowed to examine the notebook only while cross-examining Aidala, the rubber bands on the notebook had been rearranged so that the page containing the sister-in-law's description was no longer sealed from view. The prosecution, which had custody of the notebook, never called this to the attention of defense counsel who, questioning Aidala about pages missing from the notebook, understandably failed to notice this change (see App. pp. 27a-31a).

Moreover, at two stages of the Edmonds trial, Aidala specifically misled the defense by misrepresenting that the only places where he wrote down anything concerning the Borrero case were on separate yellow pages on which he had written the Whitmore confession, and that his Edmonds notebook was made in connection with that case and did not contain any Borrero notes (see App. p. 31a).

Finally, Aidala's testimony at the Edmonds trial deliberately deceived defendant's counsel as to the existence of the sister-in-law as an eye witness. Aidala testified that the description of Whitmore in his notebook came from Mrs. Borrero (H. 520-521). Petitioner, therefore, cannot be faulted for failing to inquire into the source of that description at the third Borrero trial.

Thus, even if the defense had failed to request the information, this case constitutes a denial of due process

because there was "deliberate suppression for the purpose of obstructing justice," or at least a failure to disclose evidence "whose high value to the defense could not have escaped the prosecutor's attention." *U. S.* v. *Keough*, 391 F.2d 138, 146-47 (2d Cir. 1968).

Furthermore, the Court below invoked the incorrect standard of materiality in determining that there was no suppression because the result at trial would have been the same.

In *U. S.* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969), the second circuit declared that:

> "The importance of *Brady*, then, is its holding that the concept out of which the constitutional dimension arises in these cases, is prejudice to the defendant measured by the effect of the suppression upon defendant's preparation for trial, rather than its effect on the jury's verdict" 416 F.2d at 577.

The rationale for this position was clearly stated in *Application of Kapalos*, 208 F. Supp. 883, 888 (S.D.N.Y. 1962), where the prosecutor did not tell the defense about an eyewitness who had said the defendant was not the man.

The interpretation of *Brady* in *Polisi* is correct. The Court below should have evaluated the claim of suppression of evidence in terms of its effect on defendant's preparation for trial, rather than in terms of its probable effect on the jury verdict.

III.

This Court should grant certiorari to reverse a conviction based solely on shockingly unreliable identification testimony.

This third trial of Whitmore was a brief proceeding in which Mrs. Borrero's identification of Whitmore was the sole evidence linking him to the crime. No tangible evidence or other eye witnesses were produced. Patrolman Isola, who saw and chased the assailant and discussed his description with Mrs. Borrero never suspected Whitmore was that man when he spent over an hour in his company that same morning (T. 114). Nor was any evidence of the show-ups and other suggestive stationhouse circumstances brought before the jury. Defense counsel, having been denied motions for a pretrial hearing and voir dire out of the presence of the jury, refused to explore this area for the first time by way of cross-examination of Mrs. Borrero. Petitioner contends that the denial of these motions was a violation of due process of law.

Even if Mrs. Borrero's in-court identification was properly admissible under the *Slovall* principles, it was so inherently untrustworthy that, in the absence of other probative evidence of Whitmore's guilt, the court should never have allowed the case to go to the jury and, should never have allowed the conviction to stand.* As Judge Breitel declared, "This is not the level of proof to support a criminal conviction in Anglo-American jurisprudence" (App. p. 8a).

---

* Had the court permitted a pretrial identification hearing or a voir dire during the trial, the court would have had before it the facts requiring this result.

For in addition to the highly suggestive showups and other viewings by Mrs. Borrero of petitioner at the precinct, and the disparity between the official police descriptions and Whitmore, it must be recognized that the police hoped that in Whitmore they had found the perpetrator of this and other notorious unsolved crimes. Thus, without prompting from Mrs. Borrero, Detective Aidala made Whitmore speak words at the showup that would link him to those other crimes: "I'm going to kill you first and then rape you." (H. 233-234; 583-584; 548-549). The crime against Mrs. Borrero, that was originally listed by the police as a pocketbook snatch and larceny, was changed by Detective Aidala to attempted rape two days after Whitmore had confessed to the other crimes (H. 517). Most significantly, during the course of a day of interrogation, the police obtained from Whitmore confessions later conclusively proved to be false.

As Judge Breitel stated (App. p. 10a):

> "* * *. The show-up initiated identification is tolerable if the confessions were true and destructive entirely of the People's case if the confessions were contrived. For if the confessions were contrived what confidence may men have in the court identification initiated by the show-up. Moreover, the show-up and the reconciliation of conflicting descriptions must then have laid out a path leading inevitably to the 'clear and positive' testimony upon the trial. There could be no turning back except for the strongest of souls, even to still the pangs of conscience or to avoid the risk of perjury. The case is very sad for Whitmore if he is indeed innocent of this crime; it is sadder still for the criminal law if his and other convictions may stand

on such unreliable proof. The truth is that the dismissal of charges against Whitmore would only write the end of a story already shameful, but the conviction standing will never be lived down * * * ."

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted to review the judgment of the Court of Appeals of New York.

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN
565 Fifth Avenue
New York, New York 10017

ARTHUR H. MILLER
9602 Church Avenue
Brooklyn, New York 11212

On the Petition

MYRON BELDOCK
LAURA SAGER
BELDOCK LEVINE & HOFFMAN
565 Fifth Avenue
New York, New York 10017

Opinion of the Court of Appeals of New York

Rendered: April 23, 1971

STATE OF NEW YORK

COURT OF APPEALS

2. No. 582. 70

THE PEOPLE &c.,

Respondent,

vs.

GEORGE WHITMORE, JR.,

Appellant.

* * * * *

Judgment affirmed. No opinion. All concur except Breitel, J., who dissents and votes to reverse and dismiss the indictment in an opinion in which Fuld, Ch. J., and Jasen, J., concur.

BREITEL, *J.* (dissenting):

Defendant may be innocent of this crime as he was of the other crimes to which he falsely confessed in detail. The issue therefore is not one of technical or procedural matters affecting one justly punishable, but not justly punished because of real or fancied procedural unfairness (see, Friendly, Is Innocence Relevant? Collateral Attack on Criminal Judgments, 38 Chi. L. Rev. 142). The conviction then is one that cuts to the bone and, unless resolved beyond a reasonable doubt, is intolerable in a civilized criminal justice system.

On April 23, 1964, at about 1:00 o'clock in the morning on a dark and lonely street, a young woman, aged 20, and the mother of a six-weeks-old baby, returning from her hospital work, had her purse snatched, and was subjected to an assault preliminary to a rape. A young policeman, two years on the force, had, from a distance, observed the couple walking, and, suspecting that the woman was being forced by her larger companion, followed. He came upon the pair in an alleyway and shined his flashlight. The assailant said, "Oh my God!" and fled, the policeman in pursuit. The assailant escaped.

The woman had had a full-face view of her assailant. The policeman had seen only his profile. All police alarms and notations in police memorandum books, made shortly after the crime, describe the culprit, substantially, as "male Negro, 5′ 8″ or 5′ 9″, 20 to 25, 165 lbs., ¾ tan coat", and, in some instances, adding "no further description." The victim, Mrs. Borrero, and the policeman, Patrolman Isola, on the third and on prior trials testified to recollections that differed from the recorded descriptions. The woman testified that her assailant was a light-skinned Negro, heavily pockmarked, no more than 5′ 7″, about 135 lbs., and wearing a ¾ fan coat. He wore a hat. In court, the policeman agreed with her description (except for the face which he had not seen) contrary to the details he entered, sometime after the crime, in the official police form (U.F. 61). He added that the woman gave him that description, including the information as to the culprit's pockmarked face. But, still he said, the man he saw in his flashlight and whom he pursued wore no hat.

Several hours after the crime, while the police officer was patrolling the same beat, he saw the defendant in an automatic laundry shop and questioned him. Defendant gave

his name as George Whitman and an employment which proved false. Defendant was 19 years old, a light-skinned Negro, wearing a ¾ tan coat, 5′ 6″, 130 lbs., and heavily pockmarked. He was wearing a hat. Nevertheless, the policeman did not take the defendant into custody; instead, the two investigated a building into which defendant said he had seen a fugitive flee earlier in the morning, a policeman in pursuit firing shots. In short, the policeman did not recognize the defendant as Mrs. Borrero's assailant, either from his own recollection or from what he now says was the description given to him by the victim. Of course, defendant did not fit the police alarm or police memorandum book descriptions.

The bedevilling issue is the identification of defendant as Mrs. Borrero's assailant. At this point it is or should be evident that her courtroom identification of defendant comes after a history, partly documented, and for the rest undisputed, which demonstrates conclusively that the contemporaneously described assailant and the identified defendant did not match. That conclusive demonstration appears from the record of the post-trial identification hearing, a part of the instant appeal.

Some ten days before, in Kings County, in the same vicinity, a Minnie Edmonds had been killed and raped in a particularly sadistic crime. Still earlier, in New York County, there had been the bestial rape slaying of the Wylie and Hoffert girls (see *People* v. *Robles*, 27 N Y 2d 155). Following the Borrero attempted rape-robbery, the detective at the precinct concerned with the Edmonds case, a likely parallel, was alerted. On the early morning of the day following, April 24th, the detective and the patrolman, Isola, went back to the vicinity and arrested defendant, who was still hanging around.

At the precinct house, defendant was shown alone, without a line-up, to Mrs. Borrero. She identified him positively. She, as is already known, was later to repudiate the police alarm and memorandum book descriptions as incorrect and not attributable to her. Before the day was over, defendant confessed to all three crimes, the Borrero attack, the Edmonds killing, and the Wylie-Hoffert rape-murders.

For a long time defendant was the man who killed the Wylie-Hoffert girls, the Edmonds woman, and assaulted Mrs. Borrero. Serious crimes had been solved and steps were taken to claim the substantial reward outstanding for the perpetrator of the Wylie-Hoffert murders. Indeed, defendant was to stand trial for the Edmonds killing but a hung jury was the outcome, followed by dismissal of the charges. On the first trial for the Borrero crime, the verdict was to be set aside, among other things, because of jury misconduct in learning and discussing defendant's triple confessions, stemming from widespread publicity about the Wylie-Hoffert murders with implication of defendant (*People* v. *Whitmore*, 45 Misc. 2d 506).

The fact of the matter was that the triple confessions of April 24th were utterly untrustworthy. The Wylie-Hoffert double murder confession was to be established conclusively false, containing tell-tale earlier police and newspaper misinformation about the circumstances of that crime. Moreover, the Wylie-Hoffert killer was eventually to be caught, his confessions and admissions to friends recorded, and later repeated to a police officer (*People* v. *Robles, supra*). Most important, his confessions, made under surreptitious surveillance, confirmed and explained the true facts of that killing, which, as noted earlier, differed markedly from the "facts" in the Whitmore confession. The confession of defendant to the instant crime was

not used on the third and last trial. Interestingly, his confession had been used on the second trial; the Appellate Division reversed, however, because the trial court had not permitted cross-examination as to the three confessions by defendant, in an obvious effort by defendant to show that if one confession was false and unreliable the others were, too (27 A D 2d 939).

After the third trial without the confession the case was much simpler. It all turned on the identification of defendant by the victim, clear and positive, including the tell-tale words attributed to the culprit—"first, I'll kill you and then I will rape you"—just as it would be imagined that the perpetrator of the Wylie-Hoffert and Edmonds killings might have said. The Appellate Division held the appeal in abeyance while it remitted the case for a post-trial identification hearing to determine whether Mrs. Borrero's in-court identification had been hopelessly tainted by the April 24th show-up, on the day of the triple confessions.

The evidentiary identification hearing was held before the trial justice who had presided at the third trial. After taking over 600 pages of testimony, the hearing court ruled that Mrs. Borrero's trial testimony on the crucial issue of identification was untainted by the show-up in the police station or any other improper suggestion.

The Appellate Division in remitting the proceeding for a post-trial hearing was following the new practice in resolving issues of admissibility of evidence, so grave as to raise issues of due process under constitutional standards. It has been the way that dangerously suggestive and even instigated pretrial show-ups of defendants have been tested as to their effect on the in-court testimony of identification

on which the conviction hangs or a conviction may hang (see *People* v. *Alston*, 27 N Y 2d 822, 823; *People* v. *Hanley*, 27 N Y 2d 648, 649; *People* v. *Rahming*, 26 N Y 2d 411, 416; *People* v. *Burwell*, 26 N Y 2d 331, 335-336; *People* v. *Damon*, 24 N Y 2d 256, 260-261; *People* v. *Hill*, 22 N Y 2d 686, 688; *People* v. *Ballott*, 20 N Y 2d 600, 605-606; cf. *People* v. *Gonzales*, 27 N Y 2d 53, 57; *People* v. *Logan*, 25 N Y 2d 184, 191-192; *People* v. *Lynch*, 23 N Y 2d 262, 273; *People* v. *Rivera*, 22 N Y 2d 453, 455; *People* v. *Brown*, 20 N Y 2d 238, 242-243). Moreover, the proof on the hearing must be "clear and convincing", that is, the proof must establish by clear and convincing evidence that the pretrial impropriety did not influence the in-court identification (*People* v. *Ballott, supra*; accord: *People* v. *Rahming, supra*; *People* v. *Burwell, supra*; *People* v. *Logan, supra*).

It is at the identification hearing that the details of the multiple, documented, different descriptions of the culprit were developed and which clash with the actual description of defendant. Also developed, of course, were the details of the linking of the triple crimes and the strange triple confessions by defendant. Of course, Mrs. Borrero says she did not know of the confessions before she identified defendant. She learned of them later and then consulted a lawyer about the outstanding reward, evidently believing that she had been, unfortunately, the instrument in apprehending the bestial murderer of the Wylie-Hoffert girls.

Enough has been noted to establish that the case against Whitmore is a hopeless one. No matter how positive the identification of him by Mrs. Borrero, the contradictory descriptions in the police records, the false or untrustworthy triple confessions, and the misconduct and ineptitude which made them possible, damn any prosecution of defendant for this crime unless, as in the Wylie-Hoffert

case, fresh evidence comes from an untainted source. The positiveness of the Borrero identification is no better than the positiveness of the untrustworthy confessions. The positiveness in each instance is undermined or belied by ineradicable and contradictory facts of record and history.

Nonetheless, so that the picture may be even sharper further details are added. A detective's memorandum book suggests, if it does not so state, that Mrs. Borrero's sister-in-law, who concededly observed the crime from a nearby upstairs window, said that the culprit had no hat. Her description of the culprit, which also makes him a taller and heavier man than defendant, may be discounted because she viewed the man from an angle. But it does agree with the police alarms. Patrolman Isola filled out the official police form, the U.F. 61, and he there recorded: "MN 20-25, 5' 9" 165 lbs. No hat." He also testified that Mrs. Borrero told him about the pockmarked face but he neglected to enter that in the official form. The U.F. 61 of course is made out sometime later and does not have the "rush" sometimes associated with the entries in the memorandum book.

To sum it all up, the case against defendant is undermined: by the conflicting descriptions (by themselves tolerable, but when coupled with other elements, intolerable); the astounding failure of Patrolman Isola to recognize defendant, a few hours later, as the culprit, either from his own observation, or the singularly descriptive "light-skinned, pockmarked, Negro, in ¾ tan coat, with hat, 5' 7", about 135 lbs.", if in fact he had ever received that description; by the hopeless conflict over whether the culprit wore

Nonetheless, so that the picture may be even sharper, or did not wear a hat; by the triple false or untrustworthy confessions with their odor of instigation; by defendant's probability in lying to police, established by the triple con-

fessions, making of no consequence the giving of a false name (if it was a false name—Whitman instead of Whitmore) and false employment on the morning of the crime; and by the fortunate circumstance that defendant kept hanging around the vicinity to be questioned on the one morning and to be arrested on the next. But perhaps the most revealing item of evidence in the case is the quoted, "first I'll kill you and then I will rape you" comment of the culprit. This would provide the link to the other rape-killings and the potential for a living identification witness of the perpetrator of those crimes.

This is not the level of proof to support a criminal conviction in Anglo-American jurisprudence. The law says so and has for a long time. Moreover, such a deficiency raises a question of law which may not be cured or concealed behind the shield of a jury verdict just because there was evidence to establish the People's case (*People* v. *Ledwon*, 153 N.Y. 10, 17-18; *People* v. *Gluck*, 188 N.Y. 167, 171-172; Cohen & Karger, Powers of the New York Court of Appeals, §198).

In the *Ledwon* case, *supra*, a non-capital homicide case, it was said:

> "In a criminal case the denial of such a request upon the ground that there is some evidence, or whenever there is any evidence, may present a question of law. In a civil case a question of law can be raised in this court only when the finding or verdict has no evidence to sustain it and the question has been raised by exception. But that, I think, is not true in a criminal case. A party cannot be convicted of murder, or any other grade of homicide, whenever there is merely some evidence or any evidence to sustain the charge; and the court upon the trial of such cases may be called upon to decide, as matter of law, whether the evidence

is of such a character or quality as to warrant a conviction. If this were not the rule, the jury would in all cases be the sole judge of the question, and there would be no remedy in this court against convictions clearly based upon insufficient evidence.

* * * * * *

When this legal presumption of innocence is rebutted, or when guilt is shown beyond a reasonable doubt, must of course, in some cases at least, be a question of law. The statute has established a standard of proof in criminal cases and the proof must conform to that standard before there can be a lawful conviction. Whenever it is clear that it falls below the prescribed standard the accused is entitled as matter of law to an acquittal. It is quite true that in many and perhaps in most cases, where there is a conflict as to the facts, or the proof is open to opposing inferences, the question whether on the whole it is of such a character as to satisfy the statute is for the jury, but it is obvious that there must, in practice, be some cases where the court will be bound to interpose and decide the question as one of law and, we think, this is such a case. So long as the burden is upon the People of not only removing the presumption of innocence but of establishing the guilt of the accused beyond a reasonable doubt, a mere *scintilla* or even *some proof* is not sufficient to warrant the submission of the case to the jury. (*People* v. *Owens*, 148 N.Y. 648.)" (pp. 17-18)

In analyzing proof in any case it is evident that the evidence must be taken as a whole. It is not analysis but self-deceiving sophistry to fragmentize evidence, establish the qualification of each item, and then ignore the falsity or

unreliability projected by the whole. The danger is particularly present in this case. There is no doubt that the trial identification of defendant by Mrs. Borrero is made in positive terms but the positiveness is no less than that of the triple confessions given by this defendant.* The in-court identification and Mrs. Borrero's testimony on the posttrial hearing cannot and do not erase the events of April 24th, 1964, the day of the false confessions and the suggestive show-up of defendant. The show-up initiated identification is tolerable if the confessions were true and destructive entirely of the People's case if the confessions were contrived. For if the confessions were contrived what confidence may men have in the court identification initiated by the show-up. Moreover, the show-up and the reconciliation of conflicting descriptions must then have laid out a path leading inevitably to the "clear and positive" testimony upon the trial. There could be no turning back except for the strongest of souls, even to still the pangs of conscience or to avoid the risk of perjury. The case is very sad for Whitmore if he is indeed innocent of this crime; it is sadder still for the criminal law if his and other convictions may stand on such unreliable proof. The truth is that the dismissal of charges against Whitmore would only write the end of a story already shameful, but the conviction standing will never be lived down.

Accordingly, I dissent and vote to reverse the judgment of conviction and to dismiss the indictment on the ground that the proof is insufficient, as a matter of law, to establish guilt beyond a reasonable doubt.

---

* The triple confessions achieved notoriety even in the Supreme Court, see *Miranda* v. *Arizona*, 384 U.S. 436, fn. p. 455.

Opinion of the Court of Appeals of New York

Rendered: February 17, 1971

No. 582.

THE PEOPLE &c.,

Respondents,

v.

GEORGE WHITMORE, JR.,

Appellant.

Reargument ordered and the case set down for oral argument at the April 1971 session of this Court. Counsel are requested to address their arguments particularly to the question as to whether defendant's guilt was established beyond a reasonable doubt as a matter of law.

Opinion of the Supreme Court, Appellate Division, Second Department, Kings County, New York

Rendered: July 27, 1970

1853 E/1967 and 884 E.

THE PEOPLE, etc.,

Respondents,

v.

GEORGE WHITMORE, JR.,

Appellant.

Upon a previous decision of this court (People v. Whitmore, 30 A.D.2d 877) this case was remitted to the trial court for a hearing and the within appeals by defendant (1) from a judgment of the Supreme Court, Kings County, rendered June 8, 1967, convicting him of attempted rape in the first degree and assault in the second degree, upon a jury verdict after a third trial, and imposing sentence, and (2) from so much of an undated order of said court, made upon a decision rendered May 8, 1967, as denied his motion to suppress evidence of identification, allegedly obtained in violation of his constitutional rights, have been held in abeyance in the interim. Such hearing has been had and a determination rendered thereon. Additionally, appellant has also appealed from a further order of said court dated December 30, 1969, which denied his post-hearing motion to dismiss the indictment or, in the alternative, for a new trial upon the ground of newly discovered evidence.

Judgment and order dated December 30, 1969 affirmed and undated order affirmed insofar as appealed from.

The remission above mentioned was for a hearing as to whether the victim-witness' in-court identification was tainted by the improper show-up (People v. Whitmore, 30 A D 2d 877, *supra*). After the hearing the Trial Judge found that the District Attorney had sustained the burden which was his to establish by clear and convincing evidence that the in-court identification was based upon the complainant's observations of defendant other than the tainted show-up identification and that the complainant would have been able to identify defendant in court even if the objectionable procedure in the station house had not been followed.

In our opinion, the proof justified the findings and conclusions of the Trial Judge (People v. Brown, 20 N Y 2d 238; People v. Logan, 25 N Y 2d 184).

RABIN, Acting P.J., HOPKINS, MARTUSCELLO, BRENNAN and BENJAMIN, JJ., concur.

July 27, 1970

PEOPLE v. WHITMORE—1853 E/1967 and 884 E.

Opinion of Judge Helfand of the Supreme Court, Kings County Dated December 1, 1969

SUPREME COURT

KINGS COUNTY

(CRIMINAL TERM, PART I)

Indictment No. 1176/64

PEOPLE OF THE STATE OF NEW YORK,

v.

GEORGE WHITMORE, JR.

Defendant moves for a dismissal of the indictment or, in the alternative, for a new trial upon the ground of newly discovered evidence.

The motion is denied. Judgment in this case was rendered on June 8, 1967, and the rule is that a motion addressed to the sufficiency of the indictment must be made "before judgment (e.g. *People* v. *Parker*, 8 A D 2d 863) unless the defect complained of would strip the court of jurisdiction, and such is clearly not the case here" (*People ex rel. Wysokowski* v. *Conboy*, 19 A D 2d 663; see also *People ex rel. Newman* v. *McMann*, 29 A D 2d 704; *People* v. *Mills*, 31 A D 2d 433).

Similarly, the rule is that an application for a new trial upon the ground of newly discovered evidence must be made within one year after the entry of judgment and, as

stated, judgment here was pronounced on June 8, 1967 (§466, Code Crim. Pro.; *People* v. *Hunter*, 16 A D 2d 960).

Moreover, even if the motion were timely and properly before the court, it would in any event have to be denied for want of merit.

The motion is predicated upon claims that at a post-conviction identification hearing mandated by the Appellate Division (30 A D 2d 877) certain facts came to light which pointed to the existence of evidence possibly favorable to the defendant; that this evidence had been deliberately suppressed by the police and by the district attorney; that if this evidence had been presented to the grand jury, defendant might not have been indicted and, if introduced upon the last trial, the verdict would have been different; that, inasmuch as defendant first learned of the existence of this evidence at the identification hearing, it constituted newly discovered evidence; that, in consequence of all of the foregoing, defendant is entitled either to a dismissal of the indictment or to a new trial.

Apart from the purely speculative aspects of defendant's claims, especially as regards his attack upon the indictment (see *People* v. *Howell*, 3 N Y 2d 672; *People* v. *Bergerson*, 17 N Y 2d 398), the district attorney has established to the court's satisfaction, by incontrovertible documentary proof, that the so-called newly discovered evidence was in point of fact available to defendant prior to the last trial. Indeed, in the several affirmations by counsel for defendant, past and present, in support of the motion, there are oblique, thinly-veiled admissions to this effect, albeit coupled with the explanations, here totally irrelevant, that the evidence, when available, was at the time either "not read", not deemed germane, or overlooked "in the heat of the trial."

Additionally, it is the court's considered opinion, as the judge who presided at the last trial and at the subsequent identification hearing, that, even if this "new" evidence had been adduced at the trial, the result would have been the same.

In the circumstances, defendant has failed to establish the prime prerequisites for the relief here sought (§465, subd. 7, Code Crim. Pro.; *People* v. *Priori*, 164 N.Y. 459; *People* v. *Salemi*, 309 N.Y. 208).

Submit order.

J. H.
J.S.C.

Decision of Judge Helfand of the Supreme Court, Kings County, New York, at the Conclusion of the Identification Hearing, and Read into the Record on April 8, 1969 at Pages 656 Through 658 of the Transcript

The hearing has been held and concluded, and the following constitutes the Court's decision based upon all of the evidence, oral and documentary adduced by both sides.

The Court finds that the District Attorney has sustained the burden which was his to establish by clear and convincing evidence that the in-Court identification was based upon Mrs. Borrero's observations of the defendant other than the tainted showup of identification. The Court finds that Mrs. Borrero would have been able to identify the defendant in Court even if the objectionable procedure in the station house had not been followed.

The Court has had an opportunity carefully to observe Mrs. Borrero's demeanor while she was on the stand, to appraise her credibility, her memory, her capacity and accuracy of observation. Based upon the Court's observation, and based upon the evidence as to the lighting conditions which prevailed at the time of the commission of the crime; the length of time Mrs. Borrero had the defendant under observation at close range, and her physical visual opportunity to see and to remember, the Court concludes that her in-Court identification was of an independent source and origin and in no way predicated upon the tainted showup at the station house or the events which followed that showup. There was the unmistakable ring of truth to her testimony. It was direct; it was positive; it was clear and convincing.

During the course of the hearing, discrepancies and inconsistencies obviously appeared. These, the Court holds, for the most part touched only upon peripheral matters and were in no way decisive of the principal narrow issue which the Appellate Division ordered this Court to hear and determine.

I do not think that any formal order is necessary. The Court Reporter will transcribe the minutes of this hearing inclusive of course of the Court's decision. These are to be forwarded to the Appellate Division expeditiously.

Opinion of the Supreme Court, Appellate Division, Second Department, Rendered: November 18, 1965

No. 3318

THE PEOPLE, ETC.,

Respondent,

—v.—

GEORGE WHITMORE, JR.,

Appellant.

Motion by appellant for a direction that the hearing directed by this court's order of July 22, 1968 be conducted before a justice of the Supreme Court who has not previously presided at trial in any earlier stage of this case or of the case against appellant in the Supreme Court, Kings County, under indictment 1116/64.

Motion denied.

BRENNAN, *Acting P.J.*, RABIN, HOPKINS, BENJAMIN and MARTUSCELLO, *JJ.*, concur.

Opinion of the Appellate Division

SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

July 22, 1968

THE PEOPLE, etc.,

Respondent,

v.

GEORGE WHITMORE, JR.,

Appellant.

Appeal (1) from a judgment of the Supreme Court, Kings County, rendered June 8, 1967, convicting defendant of attempted rape in the first degree and of assault in the second degree, upon a jury verdict after a third trial, and imposing sentence and (2) from so much of an undated order of said court, made upon a decision rendered May 8, 1967, as denied defendant's motion to suppress evidence of identification allegedly obtained in violation of his constitutional rights. Case remitted to the trial court for a hearing as to whether the victim-witness' in-court identification was tainted by the improper show-up (People v. Hill and Kessler, 22 N.Y.2d 686, 291 N.Y.S.2d 802, 238 N.E.2d 913, dec. May 16, 1968). In the interim the appeal will be held in abeyance.

BRENNAN, Acting P. J., and RABIN, HOPKINS, BENJAMIN and MARTUSCELLO, JJ., concur.

Order of the Court of Appeals of New York Amending the Remittitur

Rendered: July 7, 1971

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1971.

Present,

HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 612

THE PEOPLE &C.,
Respondent,

v.

GEORGE WHITMORE, JR.,
Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether appellant's rights under the Fifth and Fourteenth Amendments were violated by the denial of his motion for a pre-trial identification hearing. The Court of Appeals held there was no denial of appellant's constitutional rights.

AND the Supreme Court, Kings County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

Exhibit I to Defendant's Reply Affirmation in Support of His Motion for a New Trial Based on the Suppression of Evidence at Pages 626 Through 628 of That Motion Quoting From the Transcript of the First Borrero Trial.

Mr. Lichtman: Even more specifically, that Detective Aidala, at that time, was working with Detective DiPrima on an Edmond's homicide that was happening right in that area. They were following the m.o. on that with the m.o. on this. And that's what I'm trying to keep out specifically.

Mr. Leftow: It still boils down to one point, your Honor, that Detective Aidala had no other information at this particular time than he got from Isola.

The Court: That's been brought out. I asked him that particular question. He said he had other information about the crime other than what Patrolman Isola gave him. He spoke to Grace.

Mr. Leftow: What he was referring to and what Mr. Lichtman is concerned about; the other information he had not directly connected Whitmore, but other crimes.

Mr. Lichtman: I don't want you to be concerned about that.

The Court: You must understand police work, where there are crimes of a similar species committed, the police follow a lead, if they can, as to the other crimes too. Now what my job is up here, is to make sure that I prevent any error about permitting any suspicion of this defendant being involved in any other offense of any kind.

Mr. Leftow: How about this question: Did he have any other information about George Whitmore, personally?

The Court: At that time?

Mr. Leftow: At that time.

The Court: Suppose he says yes, then what?

Mr. Leftow: Once again—

The Court: Suppose he says yes? If he says no, that would be the end of the question.

Mr. Leftow: I'll ask him once again. I don't know the operation of his mind.

The Court: What would you do then, ask him what it was?

Mr. Leftow: No.

The Court: I would have to exclude it. All right go down and make sure you keep away from that.

Excerpt From Petitioner's Reply Affirmation in Support of His Motion for a New Trial or Dismissal of the Indictment Based on the Discovery of Suppressed Evidence (pp. 15-17).

Pages 24 and 117 of the Aidala notebook were never shown to defense counsel in Court or during an out-of-Court examination that was held at the District Attorney's office at the time of the Rinaldi hearing in February 1965, contrary to the statements made in the District Attorney's answering affidavit. I have carefully examined the relevant pages of the Rinaldi hearing which run from approximately page 25 through page 490. There were extensive discussions concerning the application of defense counsel to examine certain exhibits, including certain specifically numbered pages of the Aidala notebook, marked People's Exhibit I at the Rinaldi hearing. It is important to observe at the outset that these pages did not include pages 24 and 117 and that the defense counsel were precluded from examining any other pages. See, e.g., Rinaldi hearing, pp. 100-103. The pages in Aidala's notebook which are identified on the record and which were the only pages made available for scrutiny by defense counsel were, as stated by the Court: face pages 26, 27, 28 and 29; and back pages 115, 114, 113 and 112 (Rinaldi hearing, p. 101).

Ultimately, a meeting took place at the office of the District Attorney under the guidance of Assistant District Attorney Lichtman and in the presence of Detectives Aidala and DiPrima and the County Detective. *Those documents which had been marked for identification* were examined by Messrs. Reiben and Miller in company of

Messrs. Johnson, Williams and Levine (Rinaldi hearing, pp. 192-193). See annexed affidavits of Messrs. Miller and Reiben. There is no question about the fact that counsel were only permitted to see those pages of the notebook and those documents which were marked for identification and nothing else.

For the Court's assistance and understanding of this situation, I cite the general areas of the record covered by the following pages: Rinaldi hearing, pp. 25-26; 86-90; 100-103; 149-193.

In reviewing these pages, the Court should note the extreme efforts to which the Assistant District Attorney went in attempting to keep defense counsel from seeing any pages of Aidala's notebook other than the four specifically identified and numbered pages which pertained to the Edmonds case and the alleged confession. The Assistant tried to convince the Court that those identified pages of the notebook which covered the Whitmore statement should be torn out of the book, giving the excuse that "there are other matters in the book" (Rinaldi hearing, pp. 100-102). When he was rebuffed by the Court, the Assistant then tried unsuccessfully to convince the Judge that the pages in question should be copied and that only the copies should be offered for examination (pp. 102-103). Other efforts by the District Attorney to prevent defense counsel from having a fair opportunity to read the notebook pages are discussed further below.

Excerpt From Petitioner's Reply Affirmation in Support of This Motion for a New Trial or Dismissal of the Indictment Based on the Discovery of Suppressed Evidence (pp. 26-27).

At page 41 of the record, Mr. Reiben started questioning concerning Exhibit 31, Aidala's stenographic notebook. Again the record reveals that there were rubber bands placed around and marking off certain portions of the notebook (Rinaldi trial, p. 841). Assuming that defense counsel adhered to the Court's previous ruling, they would have had no right to look at the sections within rubber bands until removed by the Court; and would have had no reason to look at the "free" pages which they assumed, incorrectly, but understandably, were the same ones they had previously been allowed to examine.* Aidala explained that the pages within rubber bands involved confidential sources of information which did not concern the defendant in this case (Rinaldi trial, p. 842). Mr. Reiben then asked the Court to examine the book to determine whether the pages "covered by these rubber bands had anything to do with investigation of Whitmore either into Borrero, Edmonds or Wiley-Hoffert complaints" (Rinaldi trial, p. 842).

After the book was handed to the Court, the following occurred (Rinaldi trial, p. 842):

---

* Not only did counsel have no right under the Court's ruling to look at the pages covered by the rubber bands until removed by the Court, they had already been strongly directed by the Court to respect the secrecy of those pages during a disputed incident that occurred at the time of an examination of DiPrima's stenographic notebook at an earlier stage of the trial. (Rinaldi trial, pp. 501-508.)

"The Court: Before I do that, the portion that has been marked off by these rubber bands, let's identify them for the record further by Page 19 and ending on Page 112. However, it is not that many pages, because if I take the back numbers of the pages, it would be from pages 122, reading backwards, 122 to 112, which is the center of the book.

You have had an opportunity to examine that portion of it, have you not?

Mr. Reiben: Yes, sir."

Mr. Reiben was in error in saying that he had had an opportunity to examine the portions of the memorandum book which the Court cited. Mr. Reiben, who did not have the book in his hands at that time, assumed that the pages cited by the Court—that is, those pages not set off by the rubber bands—were the same pages which had been previously identified and which he had previously been allowed to examine. He had no reason to know that the rubber bands were no longer covering the same pages previously kept from him. He had no reason to be suspicious and to be alerted to the fact that the rubber bands had been removed and rearranged. He was no longer interested in seeing those pages of the book that had been previously made available. His concern was to see those pages of the book which had been previously set apart by the rubber bands. In retrospect, it would appear that whoever had possession of the book had rearranged the rubber bands for the purpose of deceiving defense counsel. That purpose was accomplished.

Excerpts From Pages 21 Through 23 and Page 32 of Defendant's Reply Affirmation in Support of His Motion for a New Trial Based on Suppression of Evidence With Reference to Whitmore's Trial in 1965 for the Edmonds Crime.

Pages 21-23

In response to a series of questions concerning any notes he may have made in regard to the Edmonds and Borrero cases, Aidala, in line with his previous and later deceptive responses, misled the Court and defense counsel when he indicated that the notes in his stenographic book were "made in connection with the Edmonds case"; and that the notes on the two separate yellow pages "were made in connection with the Borrero case" and did not advise anyone that his stenographic notebook contained notes concerning his interview of Mrs. Borrero and the sister-in-law eye witness. So that there can be no question about my analysis, I set forth the entire portion of the record, as follows (Rinaldi trial, pp. 780-782):

"Q. Mr. Witness, did you make any notes in this case? A. Yes, sir.

Q. Do you have a memorandum book? A. I have a notebook.

Q. A notebook. Do you have it here? A. Yes, sir.

(Handed to the Court.)

The Court: The witness has handed to the Court a memorandum book. Certain pages are marked off by rubber bands. I rule now—you are asking for these at this time?

Mr. Reiben: Yes, sir.

The Court: I rule now that you may not have them at this time, but that you will be permitted under the law, as I see it, and as I call it; and when you commence your cross-examination, at that time this will be turned over to you in the courtroom for your perusal and for determination by you as to whether or not you want to use it on cross-examination.

The Witness: Yes, sir.

Mr. Reiben: May I respectfully object to the specific ruling that I cannot have them.

The Court: You have your exception.

Mr. Reiben: Thank you, sir.

The Court: That's it; is that correct?

Mr. Reiben: And that applies, I assume to any statements he took in writing.

The Court: Any personal memorandum that he has—other than what you have in this book, is there another paper in which you have a statement of any kind concerning this defendant in this case?

The Witness: Not in this case.

The Court: Do you have a so-called—if I may, I'll take a chance and use the word 'Statement' or 'Confession', in the Borrero case?

The Witness: Yes, sir.

The Court: Let me see it.

(Handed to the Court.)

The Court: Now, this is the statement you say that the defendant made; right?

The Witness: That's what he said, and what he said I wrote down.

The Court: All right. The notes in your book, those are your own notes that you made, or is it a copy of this?

The Witness: No; they're different. They're both notes that I made.

The Court: But the ones in your book, that's your personal memorandum?

The Witness: These notes were made in connection with the Edmonds case. Those notes were made in connection with the Borrero case.

The Court: Mr. Reiben, if you want this, at the proper time I will give it to you. I am not going to give it to you over the weekend.

Mr. Reiben: Thank you.

The Court: At that time it will be marked and then you may have it."

* * * * *

Page 32

Finally, at pages 1084 and 1[illegible] of the record, Aidala repeated his oft-stated misrepresentation that the only places where he wrote anything down concerning the Borrero case were on the yellow pieces of paper covering the alleged Whitmore confession; and that his Edmonds notebook did not contain any Borrero notes. Thus, in line with his previous lies, Aidala stated at p. 1085:

> Q. Was there any particular reason why you wrote the Borrero down on sheets of yellow paper similar to this, and did not write the Edmonds on sheets of yellow paper similar to this? A. Well, I didn't know at that time that there was a direct connection between the two cases, and I didn't want Borrero notes in my Edmonds notebook if the cases were not connected.